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No. 595

IN THE

Supreme Court of the United States

October Term, 1966

EDGAR PHARR, d/b/a MADISONVILLE CAB COMPANY,

Petitioner,

vs.

BUREAU OF UNEMPLOYMENT COMPENSATION, STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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The petition for Writ of Certiorari filed in this matter does not contain a bona fide statement of grounds for invoking the jurisdiction of this Court nor a bona fide reason for granting of the Writ requested.

Petitioner asserts that it has been deprived of a constitutional right in that the Hamilton County, Ohio Common Pleas Court refused to allow the issue of petitioner's liability for unemployment taxes to be submitted to a jury in a civil action at law against petitioner to collect such taxes. The trial court ruled that the cause could proceed to trial only on the issue of the amount, if any, due, since the petitioner, prior to the filing of the action at law against him under Section 4141.27, Ohio Revised Code, had appealed under Section 4141.26, Ohio Revised Code, to the Franklin County, Ohio Court of Common Pleas, a ruling

of the Bureau of Unemployment Compensation that petitioner owed certain unemployment taxes, that said ruling had been affirmed by said court, and affirmed on appeal to the Franklin County, Ohio Court of Appeals, and a motion to certify overruled by the Supreme Court of Ohio on February 15, 1961. As a consequence petitioner excepted to the ruling, and withdrew his demand for a jury trial. Thereupon the trial court dismissed the jury empaneled in the action.

It is the law of the State of Ohio as expressed by the Ohio Supreme Court in *Quinn, Aud., et al. v. The State, ex rel. Leroy,* 118 Ohio St., 48 that:

> "Material facts or questions which were in issue in a former suit and were there judicially determined by a court of competent jurisdiction are conclusively settled by the judgment therein so far as concerns the parties to that action and persons in privity with them and cannot be again litigated in any future action between the same parties or privies, and this rule also applies not only to what was determined but also to every other question which might properly have been litigated in the case."

The trial court correctly ruled, therefore, under the law controlling in Ohio, that petitioner had no question, respecting his liability for unemployment taxes to submit to a jury. He had been afforded his day in court on that issue, and under the doctrine of Res Judicata could not relitigate the same question again before another forum of the state. He was, however, afforded the opportunity of a jury trial on issues not theretofore presented, namely, the question of the amount due.

Petitioner now contends that not only does Section 4141.27, Ohio Revised Code, provide for such a civil action and trial of the issues as to whether the defendant therein is subject to the act, but the Supreme Court of Ohio has

ruled that the place and manner of presenting such an issue is in a court of law when the alleged employer is sued under the provisions of Section 4141.27, Ohio Revised Code, citing *Iden v. Atkinson, Administrator,* 138 Ohio St. 175 as authority. As a matter of law that case does not stand for the proposition that the issue, if presented under Section 4141.26, Ohio Revised Code, on appeal in a court of law, may again be presented in a court of law when the employer is sued in a civil action under Section 4141.27, Revised Code. In that case no appeal on the issue of liability for unemployment taxes had been taken to a court of law. The court merely affirmed the right of an employer to have the question adjudicated in a court of law if not previously presented or the opportunity to so present it had not been available. As a matter of practice, therefore, petitioner's rights under the Ohio and Federal Constitutions were not abridged, since the issue on which petitioner bases this claim had been decided in prior litigation between the parties.

It is also petitioner's argument that the right to trial by jury guaranteed by the Seventh Amendment is such a fundamental principle of liberty and justice as to be made obligatory upon the states by the Fourteenth Amendment. This court has held repeatedly that the Seventh Amendment right to trial by jury in civil cases is not made applicable to state proceedings as a requirement of due process or as a privilege or immunity of national citizenship under the Fourteenth Amendment. It is applicable to trials in Federal courts only. *Walker v. Sauvient,* 92 U.S. 90; *Maxwell v. Dow,* 176 U.S. 581; *Wagner Electric Mfg. Co. v. Lyndon,* 262 U.S. 226; *Hawkins v. Bleakly,* 243 U.S. 210; *New York C.R.C. v. White,* 243 U.S. 188; *Tuney v. Ohio,* 273 U.S. 510; *Snyder v. Massachusetts,* 291 U.S. 97; *Twining v. New Jersey,* 211 U.S. 78.

Petitioner notes that the Supreme Court has been re-examining in recent years, previous decisions of the Court involving the extent to which certain fundamental rights, safeguarded by the first eight amendments of the Constitution of the United States against federal action, are also safeguarded against state action by the due process of law clause of the Fourteenth Amendment. The Court in *Gideon v. Wainwright*, 375 U.S. 335, quoting Mr. Justice Cardozo, is cited by petitioner to this effect:

> "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus through the Fourteenth Amendment, become valid as against the states * * *."

The petitioner ignores, however, the complete statement of this thought by Justice Cardozo from the original opinion written by him in *Palko v. Connecticut*, 302 U.S. 319:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'; Snyder v. Massachusetts, 291 U.S. p. 105; Brown v. Mississippi, 297 U.S. p. 275; Herbert v. Louisiana, 272 U.S. 312. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."

We submit that the guarantee of the Seventh Amendment does not reflect that essence of a scheme of ordered liberty that would otherwise justify its extension to state action under the due process clause of the Fourteenth Amendment. It has been traditionally recognized by this Court that the impartial decision of factual issues in civil actions may be left as well to an enlightened tribunal as to a jury without offending the sense of justice inherent in the conscience of the people. This indicates that trial by jury in civil cases is not a fundamental principle of justice so essential to the requirements of due process as to be made obligatory to the settled course of judicial proceedings in a state court.

CONCLUSION

Respondent respectfully submits that the foregoing demonstrates that the petitioner's stated basis for invoking the jurisdiction of this Court and stated reasons for granting the writ requested are defective. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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